



UNITED SOUTH AND EASTERN TRIBES, INC.
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January 27, 2004

The Honorable Michael Powell
Chairman, Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Response to Congressman Pombo and Congressman Radanovich Letter
WT Docket No. 03-128

Dear Chairman Powell:

On behalf of the United South and Eastern Tribes, Inc. (USET), an inter-tribal organization representing 24 tribes from Maine to Texas, I am writing to express USET's strong concerns regarding a recommendation made by Chairman Richard Pombo and Congressman George Radanovich in a letter dated November 26, 2003 addressed to the Chairman of the Advisory Council on Historic Preservation and copied to you ("Pombo-Radanovich Letter"). In that letter, Mr. Pombo and Mr. Radanovich urge that a longstanding definition for "historic properties" covered by Section 106 of the National Historic Preservation Act (NHPA) be sharply narrowed, both in proposed amendments to the Section 106 rules and in the programmatic agreement currently under review by the Commission. For the reasons set forth below, USET believes that narrowing this definition would violate the letter and the spirit of the NHPA, both as it applies to "historic properties" in general and specifically as it applies to "properties of religious and cultural importance" to Indian tribes. Indeed, such a narrowing of the definition of "historic property" could potentially exclude the vast majority of tribal historic properties from coverage under the NHPA with devastating consequences for the protection and preservation of our heritage and identity. Tribes across the United States, as well as the national preservation community, would vigorously oppose the narrowing of this important definition, which has been in place for approximately 25 years. We believe that a majority of the Congress would also oppose any such action.

We have had an opportunity to speak briefly with Chairman Pombo's staff. We were greatly encouraged by their response. They recognized the unique sovereign status of tribes and indicated that tribal interests were not specifically considered in the drafting of the letter. They have committed to further discussions to hear USET's concerns in detail and to assure appropriate protection of tribal historic properties.

"Because there is strength in Unity"

The National Historic Preservation Act defines "'historic property' or 'historic resource'" as "any prehistoric or historic district, site, building, structure, or object included in, *or eligible for inclusion on* the National Register, including artifacts, records, and material remains related to such a property or resource." 16 U.S.C. Sec. 470w(5) (emphasis added). Congress found that "historic properties significant to the Nation's heritage are being lost or substantially altered, *often inadvertently*, with increasing frequency." 16 U.S.C. Sec. 470(b)(3) (emphasis added). This inadvertent damage was done principally where properties were not recognized as historic; essentially those properties not listed in the National Register of Historic Places. To address the fact that the National Register is not a comprehensive listing of historic properties, Congress logically provided that the NHPA would also protect properties that are "eligible for inclusion on the National Register...."

The NHPA authorizes the creation of one list of properties - the National Register (16 U.S.C. Sec. 470a), but as is evident from the definition of "historic property," the NHPA protects properties both on the National Register as well as properties not on the National Register if they meet National Register criteria. The Advisory Council on Historic Preservation, in its implementing regulations, recognized the NHPA's mandate to protect *all* eligible properties and provided that the term "*eligible for inclusion in the National Register*" includes both properties formally determined as such in accordance with regulations of the Secretary of the Interior and all other properties that meet the National Register criteria." 36 C.F.R. Part 800.16(l)(2). In this definition, the Advisory Council was recognizing that the Department of the Interior has created a second list of properties that have been formally determined to be eligible for, but are not on, the National Register. However, that second list is not comprehensive and is essentially merely an aid to implementing the NHPA. Therefore, consistent with the language of the statute, the Advisory Council did not limit its definition just to Interior's "eligibility" list, but also included *all* eligible properties. The Advisory Council understands that there are many sites that have not yet been evaluated but that will be found eligible for the National Register. Such sites would be in great peril if there were no requirement to essentially "watch out" for them and protect them where they are found.

The Pombo-Radanovich Letter objects to the Advisory Council's regulatory definition stating that it would include properties only "potentially eligible" for the National Register and therefore is burdensome, particularly to the telecommunications industry. Although the definition does not use the term "potentially eligible," it does contemplate, as described above, the protection of properties that are eligible for the National Register but are not on either (1) the National Register or (2) the Interior Department's separate list of properties that have been determined by the Keeper to be eligible for the National Register. The inevitable consequence of adopting the Pombo-Radanovich suggestion would be to allow the destruction of properties that are eligible for listing simply because they have never been reviewed, thus defeating the intent of the NHPA and creating a strong incentive for permit applicants to act with reckless disregard to the possible presence of historic properties.

Although the Pombo-Radanovitch Letter raises this issue in the context of visual effects of cell towers, changing the overall definition of "historic property" would have consequences that reach far beyond that issue. If there is no requirement to review properties that are not on either of the two lists, then the straightforward intent of the NHPA to cover all eligible properties cannot be effected. Further, because few sites of religious and cultural importance to Indian tribes are on either of these lists, the threat to these properties is enormous. Due to the historic problem of widespread looting and sale of Indian grave goods and artifacts, many tribes do not want their sites identified on a publicly available list. These tribes still expect and are entitled to the full protections of the NHPA from Federal undertakings that could damage these sites.

The NHPA has extensive provisions regarding Section 106 consultation and the protection of properties of religious and cultural importance to Indian tribes. Congress, recognizing that virtually no Indian properties are on the National Register, and yet thousands of such properties exist and merit protection, mandated (at 16 U.S.C. Sec. 470a(d)(6)(B) [hereinafter referred to as "Section B"]) that, with regard to Section 106 consultation, Federal agencies "shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to properties described in [16 U.S.C. Sec. 470a(d)(6)(A) (hereinafter referred to as "Section A")." Section A broadly refers to "[p]roperties of religious and cultural importance to an Indian tribe or Native Hawaiian organization...." It states that such properties "may be determined to be eligible for inclusion on the National Register." By statute, therefore, the test for whether a Federal agency must consult with an Indian tribe over a site is not whether it is actually in the National Register (or on any other list created by the Department of the Interior), but whether it is of "religious and cultural importance to an Indian tribe." The use of the word "may" in Section A connotes a recognition that many such properties are, in fact, not on the National Register but are intended to be covered by the NHPA.

If the Pombo-Radanovitch definition of "historic property" is applied to Indian properties, the protections of the NHPA for Indian tribes will have been lost. Congress did not intend such an outcome when it greatly strengthened the Indian provisions of the NHPA in 1992. Many in Congress would oppose any weakening of this language if such legislation was put forward.

Thank you for taking the time to consider USET's views in this matter. We have developed a superb working relationship with the FCC over the past year and look forwarding to an ongoing constructive dialogue with the FCC, ACHP, Industry, Congress and the preservationist community as consideration of the Section 106 amendments and the draft programmatic agreement move forward.

Sincerely,



Keller George
President